Supreme Court, U.S.
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No. 03-57006
D.C. No. CV-00-00321-AHS

IN THE

Supreme Court of the United States

SYNERGY STAFFING, INC. Fka
Personnel Connection, Inc.,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

On Petition For Writ Of Certiorari
To The UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Appellant was being required by the Internal Revenue Service to make weekly payroll tax deposits. Appellant designated timely, voluntary payments to these weekly payroll tax liabilities, but the IRS did not honor the designations, resulting in cascading penalties and interest. The question is:

Prior to the enactment of 26 U.S.C. §6656(e), did employers have the power to designate voluntary employee payroll tax deposits to tax periods within a tax quarter?

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CORPORATE DISCLOSURE STATEMENT

Plaintiff and Appellant Synergy Staffing, Inc. is a successor corporation to Personnel Connection, Inc., which was a wholly owned subsidiary of parent corporation Purcell Group, Inc. Personnel Connection, Inc. was, and Synergy Staffing, Inc. was also engaged in the business of placing temporary staffing at companies which require such services. None of these entities is a publicly held company. The following individuals hold an interest in Purcell Group, Inc.:

Joseph M. Purcell, Michael Purcell, Anthony Purcell, Jennifer Purcell and Arlene Apodaca.

STATEMENT OF JURISDICTION

The memorandum decision of the United States Court of Appeals for the Ninth Circuit (not for publication) was filed on June 10, 2005. Rehearing was denied on August 5, 2005. This Court has jurisdiction of this Petition based on 28 U.S.C. §1254(1), as this is a petition for review of a decision of the Ninth Circuit Court of Appeals.

APPLICABLE LAW

At the times material to this petition, Congress had not yet enacted 26 U.S.C. §6656(e). Thus, Appellant relies on this Court's holding in United States v. Energy Resources Co., Inc., 495 U.S. 545, 548; 110 S.Ct. 2139, 2141; 109 L.Ed.2d 580 (S.Ct. 1990), specifically the Court's statement .IRS policy permits taxpayers who "voluntarily" submit payments to the IRS to designate the tax liability to which the payment will apply.

CONCISE STATEMENT OF THE CASE

The statutory basis of subject matter jurisdiction of the District Court is its original jurisdiction of this matter pursuant to 28 USC Section 1346(a)(1), as this is an action for the recovery of payroll tax penalties claimed to have been collected without authority.

Plaintiff filed an action in the District Court for refund of penalties and interest assessed by the IRS and paid by Plaintiff as a result of the IRS's finding that Plaintiff had not timely deposited certain payroll taxes for the quarters at issue. Defendant filed its first motion for summary judgment, which Plaintiff opposed, and which was granted11 without oral argument on April 27, 2001. Plaintiff appealed from that ruling, and from the judgment dismissing the action.

The Ninth Circuit Court of Appeals reversed in part that summary judgment in favor of the Government, finding that the District Court had erred when it ruled that Plaintiff had failed to exhaust its administrative remedy on the issue of the Government's failure to apply voluntary tax payments by Plaintiff as designated by Plaintiff on the payment. This Court remanded the matter with respect to the third quarter of 1993, the last two quarters of 1995, the four quarters of 1996, the first three quarters of 1997, and the first and third quarters of 1998. Synergy Staffing v. United States Internal Revenue Service, 323 F.3d 1157 (9th Cir. 2003).

On October 14, 2003, the District Court entered its Ruling Denying Plaintiff's Motion for Summary Judgment; Order Granting Defendant's Motion for Summary Judgment, in which it granted the Government's request for summary judgment and denied that of Plaintiff. That ruling was affirmed by the Ninth Circuit, and rehearing was denied on August 5, 2005.

STATEMENT OF FACTS

In 1988, The Personnel Connection, Inc. was bought by Purcell Group, Inc. for the purpose of developing a temporary employee placement service in California, Texas and Florida.

At various times starting in 1988, Personnel Connection was untimely in depositing .trust fund. monies on behalf of its temporary employees. Plaintiff makes no claim in this case for refund or abatement of any of the penalties or interest which it paid as a result of those unfortunate delinquencies. However, where Personnel Connection was making weekly .trust fund. payments pursuant to the rules which applied to payrolls as large as it had, the weeks following a late deposit, it always designated its new, timely deposit for allocation to the pay period ending at the time

of the deposit, or the current trust fund, amount then due. Management knew that it was important to make as many timely payments as possible, because the immediate penalty for late payments was severe. However, the Internal Revenue Service consistently, and over Plaintiff's strenuous verbal and written objections, applied these payments to past due amounts, within the same tax quarter, causing the current and timely payments to be deemed late. The penalties and interest sought in this case resulted, in large part, from these illegal failures and refusals of the Internal Revenue Service to apply the payments as designated.

Based upon a very consistent custom and practice dating back to at least 1988, Appellant's payroll checks were either signed by Joseph F. Purcell or stamped with his signature, with his authorization, by Joseph M. Purcell or Debra Murray.

The District Court's error in granting the Government's summary judgment motion and in denying Plaintiff partial summary judgment on the issue of the Government's liability for a refund of penalties and interest, turns on the Court's legal analysis. That analysis concludes that, under then current law, Plaintiff's designations of voluntary tax payments did not have to be followed by the Government. That analysis is incorrect. The United States Supreme Court has set forth a clear rule that allows taxpayers to designate voluntary payments to any liability.. Appellant was applying its voluntary payments to the individual tax liabilities as established by the payment schedule required by the IRS. Appellant was permitted to so designate its voluntary payments, and the IRS was required to honor those designations.

Thus, the Ninth Circuit erred when it affirmed the judgment of the District Court, which was based on the assertion that, at the times material to this case, a tax-

payer could not designate payments to individual liabilities within a tax quarter.

ARGUMENT

The United States Supreme Court and the Ninth Circuit have, since prior to 1998 (when congress clarified this area with the enactment of 26 U.S.C. §6656(e)), held that a taxpayer may designate how a voluntary tax payment or deposit will be applied, and if she does so, the Internal Revenue Service is required to apply the payment or deposit in the manner so designated. United States v. Energy Resources Co., Inc., 495 U.S. 545, 548; 110 S.Ct. 2139, 2141; 109 L.Ed.2d 580 (S.Ct. 1990) (.IRS policy permits taxpayers who "voluntarily" submit payments to the IRS to designate the tax liability to which the payment will apply.. [Citations Omitted.]). See also Tull v. United States of America, 69 F.3d 394, 396-97 (9th Cir. 1995). (.When a taxpayer like Hatfield makes a voluntary tax payment, it can direct that the payment be applied to a particular tax liability rather than to another one. See In re Technical Knockout Graphics, Inc., 833 F.2d 797, 799 (9th Cir.1987); see also Slodov v. United States, 436 U.S. 238, 253 n. 15, 98 S.Ct. 1778, 1788 n. 15, 56 L.Ed.2d 251 (1978). The parties do not dispute that..)

The state of the law at all times relevant to this action was that a taxpayer could elect to designate a voluntary tax payment to any liability. Moreover, there is no clearer definition of a tax liability than an IRS imposed deadline to pay taxes. Since it was forced to make weekly payments, after it was late, Petitioner designated it's subsequent payments to each current liability, to avoid onerous penalties. In light of the authorities cited above, this taxpayer was permitted to do what it did, and the Government was required to follow the designations.

Instead, the government has taken the position, now endorsed by the Ninth Circuit Court of Appeals, that there were, at times material to this case, tax liabilities which the IRS could impose (i.e. weekly liabilities, as in this case) but to which a tax-payer could not designate a voluntary payment. This directly contradicts this Court's holding in Energy Resources, above.

The Ninth Circuit Court of Appeals has decided this case, which raises an important federal question, in a way that conflicts with this Court's relevant decisions in this area. Supreme Court Rule 10c.

For these reasons, as well as the injustice to the individual tax-payer in this case, Certiorari should be granted.

Dated: January 3, 2006

Andrew M. Rosenfeld
Attorney for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SYNERGY STAFFING, INC. Fka Personnel Connection, Inc. Plaintiff - Appellant	No. 03-57006 D.C. No. CV-00-00321-AHS Central District of California, Santa Ana
v	
UNITED STATES OF AMERICA Defendants - Appellee	JUDGMENT

Appeal from the United States District Court for the Central District of California (Santa Ana).

This cause came on to be heard on the Transcript of the Record from the United States District of California (Santa Ana) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **AFFIRMED**. Costs taxed in the amount of $252.70.

Filed and entered 06/10/05

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SYNERGY STAFFING, INC. Fka Personnel Connection, Inc. Plaintiff - Appellant v	No. 03-57006 D.C. No. CV-00-00321-AHS Central District of California, Santa Ana
UNITED STATES OF AMERICA Defendants - Appellee	ORDER

Before: TROTT and W. FLETCHER, Circuit Judges, and RESTANI, *Judge

The petition for rehearing, filed July 20, 2005, is hereby DENIED.[1**]

**The Honorable Jane A. Restani, Chief Judge, United States Court of International Trade, sitting by designation.